

UNITED STATES COURT OF APPEALS July 26, 2010

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

FRANKLIN DELANO FLOYD,

No. 10-6160

Movant.

ORDER

Before **TACHA, MURPHY, and GORSUCH**, Circuit Judges.

Franklin Delano Floyd seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. Because Mr. Floyd cannot meet the requisite conditions under § 2255(h), we deny authorization and dismiss the proceeding.

Following a bench trial, Mr. Floyd was convicted of kidnapping, carrying a firearm during the commission of a kidnapping, carjacking, carrying a firearm during the commission of a carjacking, felony possession of a firearm, and interstate transportation of a stolen vehicle. He was sentenced to 627 months in prison. We affirmed his convictions and sentence on direct appeal. *See United States v. Floyd*, 81 F.3d 1517, 1519 (10th Cir. 1996). In January 2007, Mr. Floyd filed a § 2255 motion to vacate, set aside or correct his sentence. In February

2007, the district court dismissed the motion as untimely. Mr. Floyd did not appeal from that decision.

To be entitled to authorization to file a second or successive § 2255 motion, Mr. Floyd must show that the claims he now seeks to raise involve:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). Mr. Floyd seeks to raise two claims. For his first claim, he contends that he was denied “lawful counsel” at trial. Mot. at 5. He admits, however, that this claim does not rely on newly discovered evidence or a new rule of constitutional law. *See id.* at 6. He is therefore not entitled to authorization on his first claim.

As for his second claim, he contends that he has newly discovered evidence involving the prosecution’s main witness, James Davis. He alleges that during discovery in Florida (in a state court murder case), a two-page handwritten statement was discovered in which Mr. Davis did not mention that Mr. Floyd had a gun during the kidnapping. But this evidence is not “newly discovered.” Mr. Floyd was indicted in the Florida case in 1997 and went to trial in 2002. Based on these dates, Mr. Floyd would have learned of Mr. Davis’s alleged

statement sometime between 1997 and 2002. Accordingly, this evidence was available to Mr. Davis when he filed his first § 2255 motion in 2007 and cannot provide a basis for granting his authorization to file a second or successive § 2255 motion.

Because Mr. Floyd has failed to meet the conditions articulated in § 2255(h), we DENY authorization to file a second or successive § 2255 motion, and DISMISS this matter. This order is not subject to further review by way of rehearing, appeal, or writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker". The signature is written in dark ink and has a long, sweeping horizontal line at the end.

ELISABETH A. SHUMAKER, Clerk